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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 733

LEO SCHMITT,

Appellant,

vs.

W. R. WILDER, AS DIRECTOR OF THE DIVISION OF LICENSING OF THE STATE OF SOUTH DAKOTA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

STATEMENT OPPOSING JURISDICTION

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Assistant Attorney General;
Counsel for Appellees.

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SUPREME COURT OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA SUPREME COURT

DOCKET NO. 8869

LEO SCHMITT,
Plaintiff and Appellant,

vs.

W. R. WILDER, AS DIRECTOR OF THE DIVISION OF LICENSING OF THE STATE OF SOUTH DAKOTA, ET AL.
Defendants and Appellees

STATEMENT OF APPELLEES IN OPPOSITION TO NOTING JURISDICTION ON APPEAL

In opposition to assuming jurisdiction of this appeal and to noting jurisdiction thereof, the appellees assert that there are no substantial constitutional questions arising under the Federal Constitution present on this appeal. The mere reference to provisions of the Federal Constitution, or the mere assertion of a claim under it, does not authorize this court to note jurisdiction of the appeal. *Sugarman* v. *United States,* 249 U. S. 182.

Jurisdiction on this appeal should not be noted for the reason that all of the questions arising under the Federal

Constitution have heretofore been adequately and fully disposed of and adjudicated by the Supreme Court of the United States. *A. Magnano Company* v. *Hamilton*, 292 U. S. 40, 78 L. Ed. 1109; *McCray* v. *United States*, 195 U. S. 27, 49 L. Ed. 95; *Hammond Packing Company* v. *Montana*, 233 U. S. 331, 58 L. Ed. 985; *Capitol City Dairy Company* v. *Ohio*, 183 U. S. 238, 46 L. Ed. 171; *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 56 L. Ed. 350.

The Supreme Court of the State of South Dakota in disposing of the questions arising under the Federal Constitution involved in this case relied heavily upon the decision of the Supreme Court of the United States in the case of *A. Magnano Company* v. *Hamilton, supra*, so well, it might, for the reason that the Supreme Court of the United States, in the *A. Magnano Company* case, would adjudicate all of the questions involved on this appeal which might arise under the provisions of the Federal Constitution.

In the *Magnano Company* case, the Supreme Court of the United States had under consideration a law of the State of Washington, imposing a fifteen cents (15¢) per pound excise tax on oleomargarine sold in that state. The law under attack in that case was to all intents and purposes and as far as this appeal is concerned, the same as the provisions of South Dakota Code, Chapter 57.40 and SDC 57.9936 and 57.9937. The Federal Supreme Court held that the Washington statute did not violate the due process clause nor the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

The appellant has attempted to differentiate this case from the *A. Magnano Company* case. The appellees contend that the cases simply can not be differentiated.

The appellant says that in the *Magnano* case the Washington statute under attack expressly declared that State

revenues were inadequate and that the tax was imposed to provide additional revenues, while in the instant statute, it is provided that "from the total amount of taxes to be raised by levy against real and personal property, a reduction shall be made equal to the amount of the taxes collected annually under the provisions of this chapter, and the balance, only after such reduction has been made, shall be levied against such real and personal property."

Chapter 57.40 and SDC 57.9936 and 57.9937 as originally enacted by Chapter 258 of the Laws of South Dakota of 1931, contain the same legislative declaration which was contained in the Washington statute. Section 6 of said Chapter 258, Laws of 1931, contains the declaration that "this action is necessary for the support of the state government and its existing institutions, etc." Furthermore, the Supreme Court of the State of South Dakota has held that a replacement provision in a taxing statute does not prevent the same from being a revenue measure. *State ex rel Botkin* v. *Morrison,* 61 S. D. 334, 249 N. W. 563, decided in June, 1933. The Supreme Court of the State of South Dakota, in the instant case, held that the statute under attack was on its face a revenue measure. These decisions of the Supreme Court of the State of South Dakota, as far as that phase of this case is concerned, are binding upon the Supreme Court of the United States. The question whether the statute under attack is a revenue measure does not involve any question arising under the Federal Constitution.

The appellant further calls attention to the fact that in the *A. Magnano* case there was no finding by the lower court, that the tax was directly responsible for the destruction of all the oleomargarine business in the state, or that the primary purpose of the tax was to prohibit rather than to tax. It was stipulated in the lower court in the *Magnano*

case that "since the effective date of said article, no importation or sales have been made" of oleomargarine. 2. Fed. 2nd 414, 417. We wish to call attention to the fact that this finding of the trial court is wholly unsupported by any evidence in this case. The conclusion that the imposition of this tax resulted in the destruction of the plaintiff's business is entirely speculative. The destruction of plaintiff's business in the selling of oleomargarine was due to the economic depression that prevailed from 1939-1940; that this economic depression was especially acute in the State of South Dakota and adjoining states. During this period of time, agricultural products, including dairy products, were at an all time low and butter was one of the articles on a surplus commodity list for free distribution for relief clients.

Appellant further points out that in the *Magnano* case there was no so-called legislative history, as is the case here. The appellant relies upon the report of said voluntary tax conference and association made to the Director of Taxation, who, in return, passed the rest on to the Governor and the Governor in turn incorporated a portion of it in his message to the Legislature in 1931. In the first place, legislative history will not be resorted to by the courts in the interpretation of the statute unless the statute is ambiguous or its meaning obscure. 50 Am. Jur. Section 325, p. 317. "Resort may not, however, be made to an administrative message for the purposes of determining the meaning of a statute which is plain and unambiguous." 50 Am. Jur. Section 325, pp. 317-318. We contend that it would be a rather dangerous rule which would permit the courts to take into consideration what was said by any voluntary group of persons, or a public officer, or even a chief executive, for the purposes of ascertaining the motive of the legislature in enacting a statute.

The Supreme Court of the State of South Dakota in the instant case held that it could not consider legislative history for the purposes of ascertaining the motives of the 1931 legislature. The determination of the court on this phase of the case is likewise binding on the Supreme Court of the United States and presents no questions arising under the Federal Constitution.

We further desire to call your attention to the fact that the State of South Dakota had a complete code revision in 1939 and Chapter 258 of the Laws of South Dakota of 1931 was re-enacted by the 1939 legislature. So we are now dealing with a 1939 law. If there was any inherent weakness which may have existed at the time Chapter 258, Laws of 1931, was enacted, such weakness was cured by re-enactment of the law in 1939. *Reaney* v. *Union County*, 10 N.W. 2d 762, 69 S. D. 392, 12 N.W. 2d 14, 69 S. D. 488.

This action was commenced in the lower court in 1944. At that time the economic depression no longer existed and the plaintiff was selling what would amount to the same as he had been doing prior to the effective date of Chapter 258, Laws of 1931. In this connection, the trial court found that after the entry of the United States into the war and the rationing of food, including butter, there were some sales of oleomargarine in the state, but that those sales did subside after rationing was lifted. We do not believe that the appellant will contend that there is any evidence to support this so-called finding of fact. This was a prophecy by the trial court and not a finding of fact at all.

The appellees therefore respectfully submit that the decision of the Supreme Court of the State of South Dakota in this case should not be reviewed on appeal in the Supreme Court of the United States for the reason that all of the issues involved in this case have already been fully and ade-

quately disposed of by the decisions of the United States and particularly by the *A. Magnano* case.

Respectfully submitted,

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